STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ROBERT LEE JOHNSON IV,

Plaintiff,

vs. Case No. 2005-1685-NI

GWINDA A-CLAY LEE and
LEWIS LEE,

Defendants.
_____/

OPINION AND ORDER

Plaintiff has filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10). Plaintiff requests that this Court determine that defendant Gwinda A-Clay Lee was negligent, that defendant Lewis Lee is vicariously liable for her negligence, and that there is no evidence of any comparative negligence on the part of plaintiff.

Plaintiff filed this complaint on April 27, 2005. Plaintiff alleges that on February 11, 2005, defendant Gwinda Lee was negligently driving a vehicle owned by defendant Lewis Lee. Plaintiff avers that Gwinda Lee's negligence led to collision with a vehicle in which plaintiff was a passenger. Plaintiff claims that, as a result of the collision, he has suffered injuries which have lead to the permanent and serious impairment of his important body functions. Plaintiff therefore commenced the present action, seeking compensation for non-economic damages he has allegedly suffered.

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In evaluating a motion brought under this subrule, the Court considers

affidavits, pleadings, deposition, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Spencer v Citizens Ins Co*, 239 Mich App 291, 299; 608 NW2d 113 (2000). When the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

In support of his motion for summary disposition, plaintiff argues that defendant Gwinda Lee's actions clearly constitute negligence. Plaintiff claims that there is no question that defendant Lewis Lee is vicariously liable for Gwinda Lee's negligence, pursuant to Michigan's motor vehicle ownership liability statute. Finally, plaintiff urges that there is no indication that he was comparatively negligent.

In response, defendants claim that, while violations of the motor vehicle code allow the trier of fact to infer negligence, the fact that a violation has occurred is not conclusive evidence that a driver was negligent. Defendants assert that there is substantial evidence in the case at bar from which the trier of fact could conclude that defendant Gwinda Lee was not negligent. Defendants do not dispute that the owner's liability statute is applicable to Lewis Lee, but argue that he cannot be held liable until a determination has been made as to Gwinda Lee's liability. Lastly, defendants suggest that there is some evidence suggesting that plaintiff was not wearing a seatbelt at the time of the collision, which they argue would constitute comparative negligence on his part.

The Court shall first address plaintiff's request for summary disposition of the issue of defendant Gwinda Lee's negligence. It is well established that a violation of a penal statute by a defendant in a negligence action creates a prima facie case from which a jury may draw an inference of negligence. *Zeni v Anderson*, 397 Mich 117, 243 NW2d 270 (1976). However, the

trier of fact may also consider whether a legally sufficient excuse has been presented to refute this inference. *Young v Flood*, 182 Mich App 538, 541; 452 NW2d 869 (1990) (citation omitted).

In the case at bar, the Court is satisfied that there is a genuine issue of material fact as to whether defendant Gwinda Lee was negligent. The Court has carefully reviewed the transcripts of the depositions taken in this matter, along with the other documentary evidence presented, and the Court believes that Gwinda Lee's negligence is not clear as a matter of law. For example, there is some question as to whether the vehicle in which plaintiff was riding was visible from Gwinda Lee's vantage point prior to the collision. If, arguendo, the vehicle in which plaintiff was riding was not visible because its headlights were not turned on until just before the collision,[1] Gwinda Lee's attempt to cross in front of the vehicle would most likely not have been negligent. Since the Court is therefore unable to hold that Gwinda Lee's operation of her vehicle was negligent without resolving disputed issues of material fact, summary disposition of this issue must be denied.

Next, the Court turns to plaintiff's request for summary disposition as to defendant Lewis Lee's liability. MCL 257.401(1) provides, in part, that "[t]he owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle . . . [if] the motor vehicle is being driven with his or her express or implied consent or knowledge." Since this Court has not determined whether defendant Gwinda Lee's actions leading up to the collision were negligent, it would be premature for the Court to hold defendant Lewis Lee liable pursuant to the owner's liability statute. As such, summary disposition of this issue is inappropriate.

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[1] There is at least some support for this factual scenario in the deposition testimony. For instance, the driver of the car in which plaintiff was riding, Christy Roy, testified that her headlights were on, but clarified that "the headlights automatically come on" in the vehicle she was operating. Deposition of Christy Roy, at 9. A possible implication of this statement is that Christy Roy did not attempt to ascertain whether her lights were actually on, insofar as she expected them to automatically turn on. Gwinda Lee, for her part, stated that she "did not see [the vehicle's] lights."

Finally, the Court must discuss plaintiff's request that the Court find that there is no evidence of any comparative negligence on his part. As noted above, defendants contend that whether plaintiff was wearing a seatbelt at the time of the collision is a question of fact. However, the testimony elicited from plaintiff indicates that he was wearing his seatbelt. Deposition of Robert Johnson, at 13. He apparently bases this testimony on his recollection that "one guy" told him that, had he not been wearing a seatbelt, he "probably would have went through the windshield because [he] spidered it with [his] head." See *id.* In other words, plaintiff testified that the cracks in the windshield suggested to at least one observer that plaintiff hit the windshield with such force that he would have been ejected through the windshield, had he not been restrained by a seatbelt. Defendants have not presented any documentary evidence effectively undermining this testimony or its rationale.[2]

The Court notes that a party opposing summary disposition pursuant to MCR 2.116(C)(10) may not rest upon mere allegations or denials of a pleading, but must, by affidavits or other appropriate means, set forth specific facts to show that there is a genuine issue for trial. MCR 2.116(G)(4). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). Since the essentially uncontradicted deposition testimony supports plaintiff's version of events, the Court finds that there is no genuine issue of material fact as to whether plaintiff was wearing his seatbelt at the time of the collision.

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Deposition of Gwinda A-Clay Lee, at 23. She later clarified that she did not see Christy Roy's headlights prior to the moment of impact. *Id.* at 32-33.

[2] Rather, defendants simply question the sequence of events following the collision as related by plaintiff, claiming that it "defies common knowledge" to suggest that plaintiff's airbag deployed *after* his head struck the windshield. Apparently, defendants are requesting this Court to discredit plaintiff's testimony regarding the seatbelt because of this unrelated, alleged inaccuracy. However, defendants' "mere allegations" regarding "common knowledge" are insufficient to preclude summary disposition of this issue. Further, the testimony at issue is by no means as clear as defendants' summary of the testimony suggests. See Deposition of Plaintiff at 14-15.

Therefore, the Court is satisfied that there is no evidence that plaintiff was comparatively negligent in this matter.

For the reasons set forth above, plaintiff's motion for partial summary disposition is DENIED as to the alleged negligence of defendant Gwinda Lee, DENIED as to the alleged vicarious liability of defendant Lewis Lee, and GRANTED as to the absence of comparative negligence on the part of plaintiff. Pursuant to MCR 2.602(A)(3), this Opinion and Order does not resolve the last pending claim or close the case.

IT IS SO ORDERED.

EDWARD A. SERVITTO, JR., Circuit Court Judge

Date:

EDWARD A. SERVITTO
CIRCUIT JUDGE

Cc: Stuart Fraser, Attorne;y for Plaintiff

Timothy Mizerowski, Attorney for Defendant

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CARMELA SABAUGH, COUNTY CLERK
BY _____ Court Clerk